No. 16-180

In The
Supreme Court of the United States

MOODY'S CORPORATION;
MOODY'S INVESTORS SERVICE, INC.,

Petitioners,

v.

FEDERAL HOME LOAN BANK OF BOSTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

28 U.S.C. § 1631 authorizes transfer of civil actions and appeals among the federal courts when a court "finds that there is a want of jurisdiction." The question presented by the petition is:

> Did the court of appeals correctly conclude that, under 28 U.S.C. § 1631, "want of jurisdiction" refers to want of either subject-matter or personal jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Respondent Federal Home Loan Bank of Boston has no parent corporation. Citizens Bank N.A. owns 13.1% of Respondent's stock. Citizens Bank N.A. is the wholly owned subsidiary of Citizens Financial Group, Inc., a publicly held corporation. No other publicly held corporation owns 10% or more of Respondent's stock.

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INTRODUCTION

Petitioners Moody's Corporation and Moody's Investors Service (together, "Moody's") ask the Court to review whether 28 U.S.C. § 1631 authorizes transfer from one federal district court to another to cure a want of personal jurisdiction. Neither this question nor the First Circuit's ruling on it warrants review. This is so for three independently sufficient reasons.

First, the circuits are not split on the question. All circuits to have reached the question agree with the First Circuit that § 1631 authorizes transfer for want of personal jurisdiction.

Second, the First Circuit's decision was correct and consistent with this Court's approach to statutory interpretation. Beginning with the statute's text, and carefully examining its context and purposes, the First Circuit determined that the statute's plain language authorized transfer for want of personal jurisdiction. The court correctly rejected Moody's interpretive approach, which elevates inconclusive legislative history above plain statutory language. Such an approach conflicts with the interpretive methods this Court has directed the federal courts to use. Nor can the plain language of the statute be trumped by Moody's two main arguments for review: a flawed constitutional argument that it failed to raise below, and an out-of-place appeal to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Third, the interlocutory character of the court of appeals' decision counsels against review. After deciding that the district court had the power to transfer the claims against Moody's, the court of appeals remanded the case to the district court to decide whether transfer would be—in the words of the statute—"in the interest of justice." 28 U.S.C. § 1631. As of the date of this filing, the district court has not yet ruled on this question. If the district court determines that it would not be in the interest of justice to transfer, it will be unnecessary to answer the question Moody's presents here. And if the district court grants the transfer, Moody's may preserve the issue for review after final judgment. In either event, Moody's petition is premature.

STATEMENT OF THE CASE

I. Factual background

The Federal Home Loan Bank of Boston (the "Bank") is a federally chartered but privately capitalized institution in cooperative form, created by Congress in 1932 to promote housing-finance opportunities for New Englanders of all income levels. C.A. App. 13-14, ¶¶ 27, 31. To pursue its housing-finance mission, the Bank loans money at competitive rates to its member financial institutions. *Id.* at 13, ¶ 27. The funding provided by the Bank enables its members to extend credit to prospective homebuyers, *id.*, and also serves as a low-cost source of liquidity for its members' other business activities.

Because the Bank must provide reliable funding to its member financial institutions, it has a conservative investment philosophy. *Id.* at 6, 14, ¶¶ 8, 33. In fact, by both internal policy and external regulatory guidance, the Bank was able to purchase only triple-A-rated mortgage-backed securities. *Id.* at 6, 92, ¶¶ 8, 738. Relying on Moody's triple-A ratings, the Bank bought a number of mortgage-backed securities. *Id.* at 6, ¶ 8.

The Bank alleges, however, that when Moody's gave triple-A ratings to these mortgage-backed securities, it knew that its ratings were false. *E.g.*, *id.* at 93, 95-96, 99-108, 110-11, ¶¶ 740-41, 745-48, 755-66, 770-71, 773-79, 785-88. All of the mortgage-backed securities that the Bank purchased "have since been downgraded to 'junk' status." App. 5. As a result, the Bank has lost hundreds of millions of dollars. *Id.*

II. Procedural history

The Bank filed suit against Moody's in 2011 in Massachusetts Superior Court, asserting claims for fraud. App. 5. Moody's consented to removal of the claims to federal court. *Id.* at 5-6. On a motion to remand to state court, the district court concluded that it had subject-matter jurisdiction under the Bank's charter, a decision that the First Circuit later affirmed. Pet. 6-7; App. 9-15.

Moody's moved to dismiss the Bank's claims, arguing both that the district court lacked personal jurisdiction over it and that the Bank had failed to state a

claim. The court found that it could lawfully exercise general personal jurisdiction over Moody's. App. 57-65. It also concluded that the Bank had stated valid fraud claims against Moody's. C.A. App. 225-27. Moody's moved the district court to reconsider its ruling on personal jurisdiction, but the motion was denied. App. 55-56.

Then, in January 2014, this Court issued *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which clarified the law of general personal jurisdiction. In light of *Daimler*, Moody's again asked the district court to reconsider its jurisdictional ruling. App. 44. The Bank, citing 28 U.S.C. § 1631, asked the district court to sever its claims against Moody's and transfer them to the U.S. District Court for the Southern District of New York, which all agreed possessed general personal jurisdiction over Moody's. *Id.* The district court granted Moody's motion to dismiss and denied the Bank's motion to transfer, believing that 28 U.S.C. § 1631 did not authorize transfer for want of personal jurisdiction. *Id.* at 47-52. It entered a separate judgment of dismissal under Federal Rule of Civil Procedure 54(b), allowing the Bank to immediately appeal the court's otherwise interlocutory order. *Id.* at 52-53.

On appeal, the First Circuit held that 28 U.S.C. § 1631 authorizes transfer for want of personal jurisdiction. Beginning its statutory analysis with the text, the court reasoned that the plain meaning of "want of jurisdiction" includes want of either subject-matter or personal jurisdiction. App. 23-24. It also noted that Congress knows how to refer solely to subject-matter

jurisdiction, but did not do so in § 1631. *Id.* at 24-26. Interpreting § 1631 to apply to want of personal jurisdiction, it continued, was consistent with other circuits, *id.* at 29-32, and consistent, too, with "§ 1631's purpose and goals," *id.* at 32.

The court observed, however, that its ruling did "not mean the Bank automatically gets its requested transfer." *Id.* at 34. Under § 1631, transfer is allowed only if it "is 'in the interest of justice,' a question the district judge did not reach." *Id.* So the court remanded the case to the district court for it to consider whether transfer would be in the interest of justice. *Id.* at 35.

On remand to the district court, the Bank renewed its motion to transfer. Pl.'s Renewed Mot. to Sever and Transfer, *Fed. Home Loan Bank of Boston v. Ally Fin., Inc.*, No. 11-10952-GAO (D. Mass. May 25, 2016), ECF No. 511. Moody's opposed the motion, arguing that it had rebutted the presumption in favor of transfer. Opp'n of Moody's Inv'rs Serv., Inc. and Moody's Corp. to Pl.'s Renewed Mot. to Sever and Transfer, No. 11-10952-GAO (D. Mass. June 22, 2016), ECF No. 517. Briefing on the motion has now closed. *See* Stip. and Order on Briefing Sched. for Pl.'s Renewed Mot. to Sever and Transfer, *Fed. Home Loan Bank*, No. 11-10952-GAO (D. Mass. May 26, 2016), ECF No. 514. As of the filing of this brief, the district court has not yet ruled on the Bank's renewed motion to transfer.

REASONS FOR DENYING THE WRIT

I. The circuits are not split on the question presented.

There is no circuit split on whether 28 U.S.C. § 1631 authorizes transfer to cure want of personal jurisdiction. The Sixth, Third, and Tenth Circuits have squarely held that § 1631 authorizes transfer for want of personal jurisdiction. *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 106-07, 109-11 (3d Cir. 2009); *Roman v. Ashcroft*, 340 F.3d 314, 328 (6th Cir. 2003); *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 218 n.9 (3d Cir. 2002); *Ross v. Colo. Outward Bound Sch., Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987). In dicta, the Eighth and Ninth Circuits have reached the same conclusion. *Johnson v. Woodcock*, 444 F.3d 953, 954 n.2 (8th Cir. 2006); *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 761-62 (9th Cir. 1990). The Fourth Circuit has acknowledged the question presented but has not reached it, *In re Carefirst of Md., Inc.*, 305 F.3d 253, 257 n.2 (4th Cir. 2002), while the Fifth and D.C. Circuits have had no occasion to address the question squarely, *see Dornbusch v. Comm'r*, 860 F.2d 611, 612 (5th Cir. 1988) (per curiam); *Hill v. U.S. Air Force*, 795 F.2d 1067, 1070-71 (D.C. Cir. 1986) (per curiam). *See also* App. 31-32 (noting that the Seventh and Eleventh Circuits, in nonprecedential orders, have declined to address the issue).

Surveying this case law, the First Circuit discerned no circuit split. *Id.* at 29-32. Moody's does not challenge the First Circuit's analysis of the case law.

Moody's does point to a footnote from *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000), but the First Circuit rightly characterized that footnote as tentative dicta. App. 31. In *SongByrd*, a federal district court in Louisiana had ruled that it lacked personal jurisdiction over the defendant and had transferred the action to a district court in New York. The court in New York then dismissed the action as time-barred. On appeal, the Second Circuit reviewed the transfer, and noted that under its own precedent, 28 U.S.C. §§ 1404(a) and 1406(a) may be used to cure want of personal jurisdiction. *SongByrd*, 206 F.3d at 179 n.9. Then, while observing that the Tenth Circuit had interpreted 28 U.S.C. § 1631 to authorize transfer for want of personal jurisdiction, the Second Circuit stated that § 1631's "legislative history . . . provides some reason to believe that this section authorizes transfers only to cure lack of subject matter jurisdiction." *Id.* This discussion "can only be characterized as dicta," App. 31, because the Second Circuit had already relied on other statutory sources for transfer authority. And even in this dictum, the Second Circuit "did not take a definitive stance" on § 1631's scope. *Id.* The First Circuit was correct to see no circuit split.

Moody's also cites a handful of district-court orders limiting § 1631 to cases where subject-matter jurisdiction is wanting. Pet. 32. A conflict of this sort does not warrant review. *See* Sup. Ct. R. 10(a). To the extent these orders are relevant at all, they favor further percolation in the lower courts. Because nearly all of these district-court orders predate the growing appellate

consensus on § 1631, *see supra* 5-6, the orders do nothing to reveal current confusion among the district courts. In any event, the courts of appeals are well positioned to straighten out lingering disagreement in the district courts—if there proves to be any. Should a district court dismiss an action because it believes it lacks the authority to transfer it under § 1631, the dismissed litigant may appeal that order to the court of appeals under 28 U.S.C. § 1291. *See* Pet. 34.

The appealability of a dismissal order also shows how Moody's arguments for certiorari undercut each other. To the extent the district courts disagree on the scope of § 1631 and thus dismiss instead of transfer, the opportunity for review that this case presents will *not* be "relatively rare," *id.*, and this Court will have future opportunities for review—should a circuit split ever develop.[1] If, however, Moody's is right that dismissals in lieu of transfer are uncommon, *see id.*, they are so because district courts agree that § 1631 authorizes them to transfer an action for want of personal jurisdiction—further counseling against granting review here.

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[1] Moody's also argues that this case presents a "relatively rare" opportunity for review because appeals following judgment in the transferee court are "likely to be impractical." Pet. 34. It cites nothing to back up this assertion, and indeed, one of the cases on which Moody's relies was an appeal following final judgment in the transferee court. *SongByrd*, 206 F.3d at 177.

II. The court of appeals correctly interpreted 28 U.S.C. § 1631 to authorize transfer for want of personal jurisdiction.

The court of appeals used well-accepted methods of statutory interpretation to conclude that 28 U.S.C. § 1631's plain language authorizes transfer for want of personal jurisdiction. The court rightly rejected Moody's invitation to disregard this Court's approach to statutory interpretation, and subordinate plain statutory language to what is, at best, an inconclusive legislative history. Nor can the statute's plain language be overridden by a flawed constitutional argument that Moody's has forfeited by failing to make below, or by a strained invocation of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

A. The First Circuit correctly employed the methods of statutory interpretation that this Court has prescribed.

1. As "in any case of statutory interpretation," interpreting 28 U.S.C. § 1631 must begin "with the language of the statute." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 283 (2011). Here, § 1631 authorizes transfer when a court "finds that there is a want of jurisdiction." The operative phrase here—"want of jurisdiction"—refers to want of either subject-matter *or* personal jurisdiction. The phrase is defined as a "lack of power to act in a particular way or to give certain kinds of relief," and includes a "lack [of] authority over a person *or* the subject matter of a lawsuit." *Want of Jurisdiction*, Black's Law Dictionary

(10th ed. 2014) (emphasis added). By definition, then, "want of jurisdiction" includes want of personal jurisdiction.

Nor does this phrase otherwise restrict its reach to subject-matter jurisdiction. It does not limit the term "jurisdiction," either with an adjective or otherwise. The First Circuit rightly declined to read such a limitation into the statute. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). The plain language of the statute, on its face, reaches both want of subject-matter and want of personal jurisdiction.

2. Context bolsters this conclusion. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 (1991) (unqualified language confirmed by statutory context). Congress knows how to refer solely to subject-matter jurisdiction. It could have limited the word "jurisdiction" with the qualifier "subject-matter," as it has done elsewhere. *See* 28 U.S.C. §§ 1390(a), 1447(c), 1447(e), 1738B(c)(1)(A)-(B). In § 1631, however, it chose not to limit the term "jurisdiction." The point here is not merely that provisions limiting the term "jurisdiction" appear elsewhere in Title 28. *Cf.* Pet. 28. The point, rather, is that Congress chose not to include in § 1631 a limitation on "jurisdiction" that it knows how to enact. *See Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 416 (2009) (restrictive language omitted from one statute but used in others shows that Congress knows how to create that restriction when it wishes). The natural inference from this omission is that Congress did not

intend to limit § 1631's use of "jurisdiction" only to want of subject-matter jurisdiction.

Another contextual clue comes from the kinds of federal courts to which 28 U.S.C. § 1631 applies. By permitting transfer to and from all courts listed in "section 610 of this title," § 1631 authorizes transfer from one federal district court to another. *See* 28 U.S.C. § 610 (listing district courts, among other federal courts). This statutory authorization would have little practical meaning if § 1631 applied only to want of subject-matter jurisdiction. That is because transfer from one district court to another will rarely if ever cure a want of subject-matter jurisdiction. Congress conferred the main heads of the district courts' subject-matter jurisdiction on *all* district courts. *See, e.g.*, 28 U.S.C. § 1331 ("[t]he district courts" have original jurisdiction over federal-question cases); *id.* § 1332(a) ("[t]he district courts" have original jurisdiction over diversity cases where the jurisdictional minimum is met); *id.* § 1333 ("[t]he district courts" have original jurisdiction over admiralty cases). In these cases, all federal district courts either possess or lack subject-matter jurisdiction—so if it is wanting, transfer from one district court to another cannot supply it. By contrast, a district court's lack of personal jurisdiction can easily be cured by transfer to a district court in another state, since a district court's personal jurisdiction usually mirrors that of the state in which it sits. *See* Fed. R. Civ. P. 4(k)(1)(A). In allowing district courts to be both transferor and transferee, § 1631 strongly suggests that it applies to want of personal jurisdiction.

More generally, the circuits' reading of § 1631 is supported by the broad range of courts on which § 1631 confers the power to transfer. These courts include both courts that often confront defects of subject-matter jurisdiction and courts that often confront defects of personal jurisdiction. *See* 28 U.S.C. § 610. That § 1631 applies to both kinds of courts suggests that it authorizes transfer for both kinds of jurisdictional defects.

Moody's, however, believes that statutory context favors its position. It argues that the statute applies only to want of subject-matter jurisdiction because it authorizes transfer or dismissal "whenever" a court finds a want of jurisdiction. Pet. 26-27. But "whenever" is a word of expansion, not limitation. While the statute allows transfer at any time in litigation, it does not exclude transfer under § 1631 when a party has timely raised lack of personal jurisdiction.

Moody's also believes that the statute's use of the word "shall" suggests that it applies only to subject-matter jurisdiction, a matter that federal courts must examine *sua sponte*. As a mere matter of grammar, however, the statute's use of the word "shall" has no connection to a court's duty to examine its subject-matter jurisdiction. The word "shall" does not command a court to examine its subject-matter jurisdiction—a command that would be superfluous anyway, since federal courts already have that obligation. Rather, "shall" refers to what a court must do if it finds a want of jurisdiction: the court "shall . . . *transfer*" if it is in the interest of justice. 28 U.S.C. § 1631 (emphasis added).

The context surrounding the phrase "want of jurisdiction," then, does not limit that phrase to want of subject-matter jurisdiction. Rather, context affirmatively suggests that the phrase applies to both personal and subject-matter jurisdiction. *See supra* 10-11. This context differentiates 28 U.S.C. § 1631 from the statute in *United States v. Morton*, 467 U.S. 822 (1984). *See* Pet. 28-29. There, the meaning of the word "jurisdiction" was limited by the surrounding plain language. *See Morton*, 467 U.S. at 829 (the "plain language" of the context was "patently inconsistent" with the notion that "competent jurisdiction" referred to personal jurisdiction). The reasoning of *Morton* suggests, in fact, that contextual limitation is *required* before the otherwise broad word "jurisdiction" will be interpreted narrowly. Any such limitation is absent here.[2]

3. The statute's purposes also support the First Circuit's ruling. As that court noted—and as Moody's does not dispute—Congress enacted § 1631 for two main purposes. First, it wanted to ensure that litigants do not lose their claims merely because a jurisdictional statute is uncertain or a lawyer has erred. App. 33. Second, it wanted to prevent duplicative filings. *Id.*

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[2] In *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946) (cited by Pet. 29), the Court interpreted Federal Rule of Civil Procedure 82 to refer only to subject-matter jurisdiction because that was the only interpretation that harmonized the rule with other rules and statutes. *Id.* at 445. Here, by contrast, the First Circuit's reading of § 1631 does not bring the statute into conflict with any other statute or rule of court.

Applying § 1631 to cases where personal jurisdiction is lacking furthers both goals.

Applying § 1631 to want of personal jurisdiction ensures that litigants are not stripped of their remedies just because of jurisdictional uncertainty. Statutes governing personal jurisdiction, no less than statutes governing subject-matter jurisdiction, can create uncertainty.[3] And diligent lawyers may easily err on whether the exercise of personal jurisdiction is consistent with due process. In this area of the law, the Court has "reject[ed] any talismanic jurisdictional formulas," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985), and recognized that "few answers will be written in black and white," *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 92 (1978) (citation and internal quotation marks omitted). Some questions of personal jurisdiction, just like some questions of subject-matter jurisdiction, may have clear answers. *See* Pet. 29 (noting that a defendant may be sued in its home forum). But many questions of personal jurisdiction will lead even a careful attorney into error. The need to prevent such errors from barring meritorious claims applies as much to personal jurisdiction as to subject-matter jurisdiction. This case illustrates the point. Here, an experienced district court twice concluded that it could

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[3] *See, e.g.*, *Commissariat à L'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1322 (Fed. Cir. 2005) (reach of state long-arm statute was unclear); *Petroleum Helicopters, Inc. v. Avco Corp.*, 804 F.2d 1367, 1371-72 (5th Cir. 1986) (same); *Austen v. Catterton Partners V, LP*, 729 F. Supp. 2d 548, 557 (D. Conn. 2010) (state long-arm statute was ambiguous).

exercise jurisdiction over Moody's, before altering course once this Court issued *Daimler*. App. 55-65.

Applying § 1631 to want of personal jurisdiction also prevents duplicative filings. If a federal court lacking personal jurisdiction cannot transfer a case to the proper court, a litigant uncertain about which forum has personal jurisdiction may decide to bring an action in both forums in the first instance, or choose to do so immediately after a defendant raises a jurisdictional challenge.

4. Rather than starting with the text and context, and then looking to statutory purpose for confirmation, Moody's takes a heterodox approach to statutory interpretation. It begins with legislative history, Pet. 23-26, and only afterward deigns to touch on text, context, and purpose, *id.* at 26-30.

That approach conflicts with this Court's precedents. The Court has stressed that all statutory interpretation begins with text and context, *see, e.g.*, *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012), and that "Congress's authoritative statement is the statutory text, not the legislative history," *Chamber of Commerce of United States v. Whiting*, 563 U.S. 582, 599 (2011) (citation and internal quotation marks omitted). Moody's backward approach to statutory interpretation invalidates its position from the start. And, in any event, because the statutory text here unambiguously authorizes transfer for lack of personal jurisdiction, Moody's reliance on legislative history is unnecessary at best. *See, e.g.*, *Exxon Mobil*

Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 567 (2005) (resort to legislative history is unnecessary where statute is plain).

Even if the legislative history is considered, it does not contradict the statutory text. Instead, the concurring opinion in which "§ 1631 has its origins," Pet. 23, actually favors the circuits' interpretation of the statute. In that opinion, Judge Harold Leventhal urged Congress to enact "a *general statute* permitting transfer between district courts and courts of appeals in the interest of justice, including *specifically but not exclusively* those instances when complaints are filed in what later proves to be the 'wrong' court." *Inv. Co. Inst. v. Bd. of Govs. of Fed. Reserve Sys.*, 551 F.2d 1270, 1283 (D.C. Cir. 1977) (Leventhal, J., concurring) (emphasis added).

Thus, even though the case before him involved a want of subject-matter jurisdiction, Judge Leventhal advocated a "general" statute that authorized transfer "specifically but not exclusively" for lack of subject-matter jurisdiction. He was contemplating a broad statute, not a narrow one.[4] Indeed, when a congressman asked for Judge Leventhal's help in drafting a transfer statute, he rejected the congressman's first draft as too narrow. He "emphasized the need to

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[4] None of the correspondence that Moody's cites indicates that Judge Leventhal later changed his mind. Pet. 24 nn.8-9. In the correspondence, he contemplated that the statute would authorize transfer for want of subject-matter jurisdiction. But the correspondence does not indicate that he wanted the statute to exclude transfer for want of personal jurisdiction.

provide for transfer between any two federal courts," and "proposed that the statute provide for a transfer between any two courts of the United States." Jeffrey W. Tayon, *The Federal Transfer Statute: 28 U.S.C. § 1631*, 29 S. Tex. L. Rev. 189, 199 n.58 (1987); *see supra* 10-11 (noting that the statute authorizes transfer from one district court to another). The general statute that Judge Leventhal supported is just what Congress enacted. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 301(a), 96 Stat. 25, 55 (creating a new chapter to house § 1631, titled "General Provisions").

Moody's, however, relies heavily on a Senate Report that is part of § 1631's legislative history. This Report suggests that § 1631 will authorize transfer where subject-matter jurisdiction is lacking, and does not say one way or the other whether the statute will apply when personal jurisdiction is lacking. *See* Pet. 24-26 & n.10. From this ambiguous silence, Moody's infers that § 1631 does not apply to cases where personal jurisdiction is lacking.

This Court has rejected past attempts to draw similar inferences from legislative history. Even where a statute's legislative history explicitly mentions one area of concern and not others, this Court has applied the statute to *all* cases that the statute's plain language reaches. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (applying Title VII to same-sex harassment even though it "was assuredly not the principal evil Congress was concerned with," and noting that "it is ultimately the provisions of our

laws rather than the principal concerns of our legislators by which we are governed"); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion) (declining to limit statute to the particular concern expressed in the legislative history because "the language of the Act plainly reaches" further); *Standefer v. United States*, 447 U.S. 10, 20 n.12 (1980) ("[A]n omission in the legislative history" cannot "nullify the plain meaning of a statute."). These cases reject precisely the sort of argument that Moody's is making now.

And these cases reject arguments like Moody's for good reason. While the Senate Report shows that "want of jurisdiction" in § 1631 includes want of subject-matter jurisdiction, it does not show that it *excludes* want of personal jurisdiction. *See Standefer*, 447 U.S. at 20 n.12. If anything, the Report suggests that § 1631 includes want of personal jurisdiction. The Report, after all, shows that the Senate knew how to specify subject-matter jurisdiction when it wished. *See* S. Rep. No. 97-275 at 11, 30 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 21, 40 (speaking of "subject matter jurisdiction"). Yet the statute that the Senate enacted does not specify subject-matter jurisdiction, and instead speaks simply of "jurisdiction." The Report suggests that § 1631 should be applied as written. At the very least, the Report is inconclusive on the question presented here, so the statute's plain language should control.

B. A flawed constitutional argument, not presented below, cannot override § 1631's plain language.

Moody's centerpiece argument for review is that the circuits' unanimous reading of § 1631 raises due-process concerns. Pet. 11-17. Nowhere in its arguments to the First Circuit did Moody's raise this constitutional argument. *See* Appellees' Br. of Moody's Corp. and Moody's Inv'rs Serv., Inc., *Fed. Home Loan Bank of Boston v. Moody's Corp.*, 821 F.3d 102 (1st Cir. 2016) (No. 14-2148), 2015 WL 4055081. Nor did Moody's raise the argument before the district court. *See* Opp'n of Moody's Inv'rs Serv., Inc. and Moody's Corp. to Pl.'s Mot. to Sever and Transfer, *Fed. Home Loan Bank of Boston v. Ally Fin., Inc.*, No. 11-10952-GAO (D. Mass. Feb. 14, 2014), ECF No. 399.

Because Moody's constitutional "argument was never presented to any lower court," it is "forfeited." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). "Absent unusual circumstances," the Court "will not entertain arguments not made below." *Id.* at 398. Moody's points to no unusual circumstances justifying departure from the Court's normal procedures. Hence, even if Moody's constitutional argument were worthy of review, this case would not present an opportunity to reach that argument.

On its merits, Moody's constitutional argument—that a court without personal jurisdiction is powerless "to do anything other than dismiss," Pet. 10—ails for several reasons. For one thing, it conflicts with

Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), which held that a court may exercise its transfer power under 28 U.S.C. § 1406(a), "whether the court . . . had personal jurisdiction over the defendants or not." 369 U.S. at 466. This holding necessarily means that a transferor court's personal jurisdiction is irrelevant to the power to transfer—i.e., that this power may be exercised even without personal jurisdiction. *Cf.* Pet. 12 n.3. The holding, moreover, turned not on the peculiarities of the Clayton Act, *cf. id.*, but on the power granted by § 1406(a). *See Goldlawr*, 369 U.S. at 466-67.

Moody's also ignores this Court's statements about what a court lacking jurisdiction may and may not do. In *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), the Court identified "[t]he principle underlying [its] decisions" allowing courts "to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 431 (citation and internal quotation marks omitted). That principle, the Court said, "was well stated by the Seventh Circuit: '[J]urisdiction is vital only if the court proposes to issue a judgment on the merits.'" *Id.* (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)). Neither transfer, nor any other task that a transferor court may perform as a prelude to transfer, Pet. 13-14, adjudicates the merits of a case.[5]

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[5] On appeal after final judgment in the transferee court, a transferred party may challenge the transferor court's determination that the transferee court has jurisdiction—and any other part of the transferor court's transfer order. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (noting that a transferee court's adherence to the transferor court's decision

None of them actually decides—or is aimed at deciding—the merits of the Bank's claims or Moody's defenses. Moody's asserts that it would be able to assert a statute-of-limitations defense in a hypothetical refiled action, *id.* at 14, but that hardly shows that a transfer order adjudicates a statute-of-limitations defense in *this* action.

Moody's alludes also to the general importance of personal jurisdiction. *Id.* at 15-17. But personal jurisdiction is no more important than subject-matter jurisdiction—lack of which, all agree, allows for transfer under § 1631. *See generally Ins. Co. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (noting that subject-matter jurisdiction is always an "Art[icle] III as well as a statutory requirement"). It is thus difficult to understand why the importance of personal jurisdiction mandates an atextual reading of § 1631.

C. An inapposite appeal to *Erie* cannot override § 1631's plain language.

Moody's next argues that the First Circuit's ruling goes against the "[p]rinciples of *Erie*." Pet. 17.

Moody's does not appear to argue that the First Circuit's decision conflicts with *Erie* itself. Nor could it. Under *Erie*, while "state law generally supplies the rules of decision in federal diversity cases, it does not

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"cannot insulate an issue from appellate review"); *see also Song-Byrd*, 206 F.3d at 178 n.7.

control the resolution of issues governed by federal statute." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 198 (1988) (citations omitted). Hence, § 1631 must be applied here unless it is not "rationally capable of classification" as a procedural rule that Congress may enact under the Necessary and Proper Clause. *Id.* at 199 (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)). Moody's, however, does not argue that § 1631 exceeds congressional power under that Clause. And for good reason: No less than a statute defining when "an appeal may be taken from one federal court to another," *id.*, a statute defining when a transfer may be made from one federal court to another may reasonably be classified as a procedural rule.

Rather than relying on *Erie* itself, Moody's instead argues that "principles of federalism" favor a narrow reading of § 1631. Pet. 17; *see id.* 19-22. Moody's is incorrect. Even where federalism principles might be relevant to a federal rule, they cannot override the plain language of that rule. Federal procedural rules are not "to be narrowly construed"—they "should be given their plain meaning." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 405-06 & n.7 (2010) (same). The plain meaning of 28 U.S.C. § 1631 authorizes transfer for want of personal jurisdiction. In asking the Court to ignore this meaning, Moody's invites it to usurp Congress's "power over federal procedure." *Hanna*, 380 U.S. at 474. That invitation should be declined.

In the end, Moody's is left with policy arguments, which cannot trump plain statutory language. *See, e.g.*, *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2002 (2016) (policy arguments cannot supersede clear statutory text). These arguments, however, are faulty even on their own terms. Moody's maintains, for example, that the circuits' unanimous interpretation of § 1631 will lead to forum shopping. Pet. 21-22. That concern lacks a basis in reality. The statute allows transfer only "if it is in the interest of justice." 28 U.S.C. § 1631. If a plaintiff "overreach[es]" in its choice of forum, and chooses federal rather than state court simply because of the transfer statute, Pet. 22, it will not be in the interest of justice to transfer the action. The lower federal courts have had little trouble declining transfer in similar circumstances. *See, e.g.*, *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1300-01 (D.C. Cir. 1996) (affirming denial of transfer where plaintiff's theories of personal jurisdiction were obviously incorrect); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1202 (4th Cir. 1993) (affirming denial of transfer because "plaintiffs' attorneys could have reasonably foreseen when they brought their claims that the Maryland district court lacked personal jurisdiction"). Section 1631 contains a built-in prophylactic against forum shopping.

III. The interlocutory posture of this case counsels against immediate review.

The interlocutory character of a court of appeals' decision disfavors review. *See, e.g.*, *Bhd. of Locomotive*

Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282-83 (10th ed. 2013). This is a case in point. The First Circuit remanded the appeal to the district court, directing it to determine whether transfer is in the interest of justice. App. 35. On remand, the Bank renewed its motion to transfer. As of the date of this filing, however, the district court has not yet ruled on the motion. If the district court denies the Bank's renewed motion and the First Circuit affirms that denial, it will not be necessary to answer the question presented.

Even if the district court grants the Bank's motion and transfers its claims against Moody's to the U.S. District Court for the Southern District of New York, an appeal will be available after final judgment. *See SongByrd*, 206 F.3d at 177. At that point, if the Second Circuit affirms a judgment in favor of Moody's or reverses a judgment against it, the transfer question will become academic. If the result on appeal is otherwise, Moody's will be able to petition this Court to review the transfer question. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Either way, Moody's petition is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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